STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS JOHN-LEE BANKS,

Defendant-Appellant.

UNPUBLISHED
January 31, 2003

No. 235191
Calhoun Circuit Court
LC No. 00-002668-FH

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of fleeing and eluding in the third degree, MCL 257.602a, and driving on a suspended license, MCL 257.904. He was sentenced to one and a half to ten years in prison on the fleeing and eluding conviction and to a consecutive term of six months on the suspended license conviction. He now appeals and we reverse and remand.

Officer Jeffrey Coons of the Battle Creek Police Department observed a Camaro moving at a high rate of speed. Coons followed the Camaro, though he did not immediately turn on his overhead lights or siren because there was another vehicle between him and the Camaro. The Camaro made some turns and Coons turned on his overhead lights once the intervening traffic cleared. Shortly thereafter, the Camaro turned into an alley and the driver fled the vehicle on foot. Coons did not see where the suspect ran to, but a witness indicated that the suspect had entered a brown house. After entering the house, Coons saw defendant come out of a bedroom wearing only his boxer shorts. Looking in the bedroom, Coons saw a checked shirt, which matched the suspect's shirt.

By this point, other officers had arrived at the scene. Coons went back to his patrol car to review the videotape to see if he could confirm defendant's identity as the driver. While doing so, he was directed by radio to return to the house as defendant had admitted to being the driver.

Defendant raises two issues on appeal, one of which is dispositive. Defendant argues that he was denied effective assistance of counsel because counsel failed to move to have his statement admitting to driving the Camaro suppressed from evidence. We agree.

Sgt. David Walters stayed with defendant in the house while Officer Coons went back to his patrol car. Sgt. Walters testified regarding defendant's statement as follows:

Q. Okay. So was he free to leave?

A. I would say right then, no; not free to leave, because we were still investigating the incident. An arrest hadn't been made, but no; I would not have let him leave; no.

* * *

Q. Okay. At any time, while you were with Mr. Banks in the brown house, did you advise him of his rights?

A. No.

Q. And did you place him under arrest?

A. No.

Q. Okay. So you did not advise him of his rights, but you considered him a suspect in this case.

A. That's correct. Yes.

Q. And then you testified that you struck up a conversation?

A. Yes.

Q. Okay. And they [sic—then?] you asked him why not just tell me – what, exactly did you say?

A. Well, I introduced myself so he knew who I was, and I said why don't you just tell me were you driving the car or not?

Q. Okay. And your testimony is that he said yes to you?

A. Yes.

On appeal, the prosecutor does not argue that this statement was not obtained in violation of the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), that an advice of rights precede any custodial interrogation. Indeed, defendant was clearly in custody, as reflected by Sgt. Walters' statement that defendant was not free to leave, and clearly there was interrogation.[1] In any event, because the prosecutor does not argue that a suppression motion would have failed because defendant's statements were admissible, we will assume for

[1] Defendant also made a statement at the jail to Officer Coons admitting to driving the car. However, it does not appear that the *Miranda* warnings had yet been read at that point, either. Moreover, the prosecutor does not argue that this second statement would have been admissible, rendering the admission of the first statement harmless.

purposes of this appeal that a motion to suppress defendant's statement because of a *Miranda* violation would have been successful.

The prosecutor does argue, however, that defense counsel's decision at trial not to challenge the admissibility of the statement constituted a matter of trial strategy. Specifically, the prosecutor points to the portion of defendant's closing argument where counsel essentially argued that the officer's testimony that defendant admitted to driving the car was too incredible to believe and, therefore, the officer must be lying. Specifically, defense counsel argued in part as follows:

> So while Mr. Banks is detained inside the house, you heard testimony there was a perimeter of officers around the house. There's one inside, couple outside, and while he's in there, he conveniently, right away, just says yeah; I was driving. They call around. Stop any further investigation. He just admitted it. That simple. Just, come on. Tell me you were driving the car. But they didn't bother to take a written statement. That would have been – if he's admitting, yeah, he was the driver; he's just admitted the crime, let's have him write it down and sign it. They didn't do that.
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> As I said earlier, they need a confession from Mr. Banks because without it they don't have a case. Think about that. Why would he just say, out of the blue, yeah; it was me?

While this argument may have been the most effective way for defense counsel to blunt the effect of defendant's statements, we fail to see what sound trial strategy would exist by allowing in defendant's admissions. Certainly defense counsel did attack the police investigation as being sloppy, arguing that once the confession was obtained, then nothing else was done to connect defendant to the car: the car was not dusted for defendant's fingerprints, the owner of the vehicle was not called to testify that he loaned the vehicle to defendant (it not being a stolen vehicle), no one in the house testified as to when defendant entered the house, nor were the shirt or the videotape entered as exhibits for the jury to view.

Perhaps it was defendant's strongest argument, once his statements were admitted, to suggest that the police invented defendant's statements to cover up a sloppy investigation. However, we fail to see how allowing in the testimony regarding the statements would support the defense theory. Defendant could still have raised the "sloppy investigation" defense without the statements, pointing out that nothing other than Officer Coons' testimony established that he was driving the car and that that testimony merely established that defendant generally looked like the suspect and that Coons saw a shirt that looked like the one worn by the suspect in the bedroom defendant came out of, a shirt that was never produced as an exhibit. Moreover, there is no need to suggest that the officers were being less than truthful if defendant's statements are not admitted.

On the other hand, once defendant's statements are admitted, the defense theory was weakened, rather than strengthened. Defendant now has to explain away his admission. Further, if the jury accepts defendant's statements, it now provides a basis for explaining the sloppy

investigation: there was no need to pursue the other evidence once defendant admitted to driving the car. Indeed, even the prosecutor in closing argument said he didn't know if the evidence of defendant's driving, other than defendant's statements, constituted proof beyond a reasonable doubt. But, the prosecutor went on, that question did not have to be answered because they did have defendant's statements, which established defendant as the driver beyond a reasonable doubt. In short, allowing in the statements undermined defendant's theory, not strengthen it.

The standard of review for claims of ineffective assistance of counsel was set forth by the Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001):

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Contrary to the prosecutor's argument, we see no basis for describing counsel's failure to move for suppression of defendant's statements as sound trial strategy. Simply put, allowing defendant's statements in and having to convince the jury that the officers were being untruthful in their testimony about the statements would make it more difficult, not less, to convince the jury of defendant's theory.

Furthermore, without defendant's statements in evidence, the outcome of this trial is very much in question. No one testified that they saw defendant driving the car. The witness who testified that she saw the suspect running towards the brown house could not establish that the suspect actually entered the brown house. Even Officer Coons testified that defendant was the person he saw coming out of the bedroom dressed only in boxer shorts, not that defendant was the person he saw driving. Without defendant's statement, the only evidence linking defendant to the crime is that he matched the description of the driver, a shirt matching that worn by the driver was found in the same room as defendant, and defendant was sweating when Coons spoke with him. While a jury might convict on such evidence, as the prosecutor acknowledged during his closing argument, it was defendant's statements that kept the jury from having to decide if reasonable doubt existed based on that evidence.

For the above reasons, we conclude that defendant was denied the effective assistance of counsel when counsel failed to move to suppress defendant's statements to the police. We conclude that there exists a reasonable possibility of a different result had defense counsel made the suppression motion.

In light of our disposition of this issue, we need not address defendant's other issue, whether there was sufficient evidence to support his conviction.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald